Supreme Court, U.S.
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No. 97 - 632

IN THE

Supreme Court of the United States

October Term, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

OPPOSITION OF RESPONDENT TO MOTION BY DEFENDERS OF PROPERTY RIGHTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

ARNOLD P. MESSING*
Eric W. Wodlinger
H. Hamilton Hackney, III
John J. Goldrosen
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, Massachusetts 02109
(617) 248-5000

Counsel for Respondent
Cape Cod Commission

*** Counsel of Record**

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REASONS FOR OPPOSING THE MOTION

Pursuant to Supreme Court Rule 37.5, the Respondent Cape Cod Commission hereby opposes the motion dated November 10, 1997, made by the Defenders of Property Rights as Amicus Curiae, seeking leave to file a brief ("Brief") in support of the Petitioner Francis E. Daddario's petition for a writ of certiorari.[1] The Respondent states the following reasons for its opposition to the motion:

1. The Brief does not "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties"; its filing would merely burden the Court and is not favored. Supreme Court Rule 37.1. A motion for leave to file an amicus curiae brief is particularly disfavored when it is presented before the petition for writ of certiorari has been granted. Supreme Court Rule 37.2 (b). The Brief is duplicative; it addresses the same "taking" issues already presented by the Petitioner in his petition for writ of certiorari, and does not offer a different perspective or place this case in a broader context.[2] Furthermore, as is discussed infra, the Brief misstates factual findings and rulings of law in the proceedings below and holdings by this Court, and thereby clouds, rather than clarifies, the fitness of this case for

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[1] The Amicus Curiae failed to follow the procedure specified in Supreme Court Rule 37.2 for the submission of an amicus curiae brief before the Court's consideration of a petition for a writ of certiorari. Rule 37.2 allows such a brief to be filed if all parties consent, or by leave of the Court if a party has withheld its consent. The Amicus Curiae states in its motion that the Respondent "refused to consent" to the filing of the Brief. In fact, the Respondent has no record of ever receiving a request for its consent from the Amicus Curiae.

[2] In addition to rejecting the Petitioner's regulatory taking claim on its merits, the Supreme Judicial Court found that the taking claim was not ripe. See Daddario v. Cape Cod Comm'n, 425 Mass. 411, 414-15 (1997) (Petition for Writ of Certiorari Appendix at 5a-7a). The Brief addresses the taking claim, but ignores the ripeness issue.

review by the Court. These errors render the Brief unreliable and of little value to the Court in considering the petition for writ of certiorari.

2. The unfamiliarity of the Amicus Curiae with the prior proceedings may explain, though it does not excuse, the Brief's erroneous assertions as to what transpired in the State trial and appellate courts.[3] The Brief mischaracterizes findings and rulings of those courts, and fails to distinguish between the Petitioner's assertions and those courts' actual conclusions. For the sake of brevity, the Respondent lists only some egregious examples:

a. The Brief asserts that, at trial, "expert testimony indicated that Respondent's permit denial had reduced the value of Petitioner's property by at least seventy-eight percent," and that the Respondent's expert "conceded" this reduction. (Brief at 7, 15.) In reality, the Respondent's expert appraiser testified that the estimate of value for sand and gravel mining offered by the Petitioner was speculative because of the lack of on-site geological investigations. The Petitioner's estimate was never adopted by the trial court, and the Supreme Judicial Court noted that there had been no final determination as to either the extent of the regulation or the "after-imposition" value. Daddario v. Cape Cod Comm'n, 425 Mass. 411, 417-18 (1997) (see Petition for Writ of Certiorari ("Pet.") Appendix ("App.") at 9a-10a).

b. The Brief offers a misleading summation of the Supreme Judicial Court's decision to reject the Petitioner's taking claim. According to the Brief, the Supreme Judicial Court found

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[3] The Amicus Curiae did not participate in the prior appellate review of this case by the Massachusetts Supreme Judicial Court, as it could have done under that court's procedures. See Mass. R. App. P. 17 (brief of amicus curiae may be filed by leave of appellate court). (Several amicus curiae briefs were filed at that time in support of the Respondent.) Having forgone the opportunity to express its views on an earlier occasion, the Amicus Curiae now seeks to support the Petitioner with little knowledge of the trial record or the proceedings before the Supreme Judicial Court.

that substantial beneficial and productive use remained from rights in the surface estate of the Petitioner's property, precluding an award of just compensation in spite of complete elimination of the rights to the mineral estate and a diminution of seventy-eight percent of the property's total value. (Brief at 6-7, 15.)[4] In fact, the Supreme Judicial Court considered the impact of regulation on the property as a whole, analyzed the taking claim according to the factors suggested by this Court in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), and concluded that the property, as a whole, retained substantial value. (Pet. App. at 7a-10a.) The Supreme Judicial Court never accepted the Petitioner's theory that separate mineral and surface estates, requiring independent analysis, existed in the property.

Moreover, the Supreme Judicial Court clearly rejected the Petitioner's fundamental contention that the regulatory decision had eliminated all potential value from sand and gravel mining on the property. That court noted that the Respondent's staff had "demonstrated a willingness to permit less extensive mining proposals. The denial of a particular plan cannot be equated with a refusal to permit any development." (Pet. App. at 9a.) Thus, the Supreme Judicial Court's findings undermine entirely the Amicus Curiae's attempt to depict this case as one in which a regulation has eliminated totally the value of a separate mining estate.

c. The Brief states that "the trial court held that Petitioner was entitled to just compensation for Respondent's permit denial . . ." (Brief at 5), implying that compensation was awarded. Actually, the trial judge concluded that the denial constituted a taking, but did not order the payment of compensation, and never made any finding as to the value of the property

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[4] Neither the trial court nor the Supreme Judicial Court found that the denial of a mining permit had reduced the value of the Petitioner's land by seventy-eight percent, or by any other percentage or absolute number.

pre- and post-regulation. Instead, the trial judge ordered the Respondent to approve the permit application, with two minor conditions. (Pet. App. at 17a-18a, 26a-29a.) Because the Supreme Judicial Court concluded that the trial judge erred in finding that a taking had occurred, that court vacated the order requiring permit approval. (Pet. App. at 2a, 4a-5a.)

3. The Brief is equally misleading in summarizing this Court's holdings on regulatory takings. One example will suffice. In arguing that Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), "indicates ambiguity as to whether the per se takings rule can be applied to partial takings" (Brief at 14), the Brief quotes selectively from Lucas, 505 U.S. at 1019 n.8. The purported "ambiguity" is eliminated by examining the remainder of the first paragraph in the footnote, which the Brief deleted:

> *"[Justice Stevens'] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation,* but, as we have acknowledged time and time again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations."

Lucas, 505 U.S. at 1019-20, n.8 (emphasis in original) (text quoted by Amicus Curiae in italics, text deleted by Amicus Curiae in plain font). The fuller quotation makes it clear that where the owner of real property has not been deprived of "all economically beneficial uses," id. at 1019, a per se categorical taking has not occurred, and the Penn Central analysis is to be carried out. As stated in Penn Central, 438 U.S. at 124, no "set formula" exists for determining when a taking

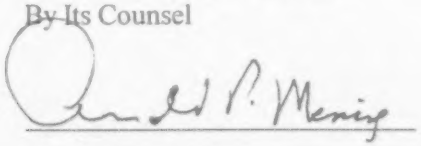
has occurred; the decision depends on the circumstances of the case, and requires an ad hoc inquiry involving a number of significant factors (including those mentioned in the quotation from Lucas, supra, and also "the character of the government action"). Any ambiguity in the analysis of a regulatory taking claim arises not from this Court's consistent holdings as to the analytical procedures to be followed, but only from the inherently case-specific nature of the inquiry. The Supreme Judicial Court followed the procedures specified by this Court. (See Pet. App. at 7a-9a.)

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the motion by the Defenders of Property Rights for leave to file an amicus curiae brief in support of the petition for a writ of certiorari.

Respectfully submitted,

CAPE COD COMMISSION
By Its Counsel



Arnold P. Messing
Counsel of Record
Eric W. Wodlinger
H. Hamilton Hackney, III
John J. Goldrosen
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, Massachusetts 02109
(617) 248-5000

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